

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2522-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**GALEN MERRIAM, LINDA MERRIAM, AND
GRAN MER ACRES, INC.,**

PLAINTIFFS-APPELLANTS,

V.

**CONTINENTAL CASUALTY COMPANY,
MARK A. SEIDL AND MARK A. SEIDL, S.C.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Reversed and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Galen and Linda Merriam and Gran Mer Acres, Inc., sued Mark Seidl, alleging that he was negligent in advising them with respect to state and federal tax consequences attendant to the corporate dissolution of Gran

Mer, a dairy farm. The jury found that Seidl was negligent and awarded the Merriams \$36,000.00 in damages. The Merriams argue on appeal that the trial court erred in granting Seidl's motion *in limine*, which barred evidence of the interest and penalties they incurred with respect to their federal tax liability. The Merriams also argue that the trial court erred in denying their postverdict motions for either a new trial on the issue of damages or *additur*. Because the trial court erred when it granted Seidl's motion *in limine* and when it denied the Merriams's postverdict motions, we reverse the trial court's judgment and remand the cause for further proceedings.¹

BACKGROUND

The Merriams hired Seidl to investigate the legal options and tax consequences attendant to the corporate dissolution of Gran Mer. Galen Merriam testified at trial that Seidl informed him that a dissolution would result in no federal corporate tax liability and little or no state corporate tax liability. The Merriams elected to go forward with the dissolution, and the corporation was dissolved on July 1, 1993.

Approximately one year after the dissolution, the Merriams received notice that Gran Mer's dissolution was subject to significant tax liability. Gran Mer's successors in interest owed the state \$16,294.00 and the federal government \$45,125.00.

¹ This is an expedited appeal under RULE 809.17, STATS.

Following negotiations with the state, the Merriams settled the tax claim for \$12,000.00. The federal tax claim remained unpaid at the time of trial and had accumulated approximately \$18,000.00 in interest and penalties.

Seidl moved the court to bar the introduction of evidence before the jury regarding the \$18,000.00 in interest and penalties that the Merriams owed on their federal taxes. The trial court granted the motion, concluding that the Merriams' liability for interest and penalties was not related to Seidl's negligence: "The ability or inability of the plaintiffs to pay those taxes is a wholly separate matter. It's not related to the negligence, if any, of [Seidl]."

The jury returned a verdict finding that Seidl was negligent and that his negligence was a cause of damage to the Merriams in the amount of \$36,000.00. The Merriams and Gran Mer filed motions after verdict requesting *additur* or a new trial on damages to correct the trial court's alleged error in barring evidence of the federal interest and penalties. The trial court denied the motions and this appeal followed.

DISCUSSION

A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). A trial court erroneously exercises its discretion if its ruling is predicated upon a misapplication or erroneous view of the law. *See State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733, 737 (1968).

It is black letter law that a negligent act, causing damage to a person or his or her property, gives him or her a cause of action for all damages proximately flowing from that negligent act. *See Booth v. Frankenstein*, 209 Wis. 362, 368-69, 245 N.W. 191, 193 (1932). In negligence actions, like this case, damages may be recovered for all injuries resulting directly from the negligence, whether within the parties' contemplation or not. *See A. E. Investment Corp. v. Link Builders, Inc.*, 62 Wis.2d 479, 484, 214 N.W.2d 764, 766 (1974). "Once negligence is established, the defendant is liable for unforeseeable consequences as well as foreseeable ones." *Id.* The injured party has a duty to mitigate his or her damages by reasonable effort and without undue risk. *Sprecher v. Weston's Bar, Inc.*, 78 Wis.2d 26, 42-45, 253 N.W.2d 493, 500-02 (1977). The alleged failure to mitigate damages is an affirmative defense which must be pleaded in the defendant's answer or be deemed waived. *See id.* at 47, 253 N.W.2d at 502.

The jury decided that Seidl was negligent and that his negligence was causally related to the Merriams' state and federal tax liability. Accordingly, both the interest and penalties assessed for the Merriams' untimely payment of their federal tax liability were relevant to the jury's duty of determining the compensable consequential damages stemming from Seidl's causal negligence. The Merriams had a legal duty to mitigate these damages, and Seidl's answer properly pled this affirmative defense, preserving it for trial.

In light of the foregoing analysis, the trial court erroneously exercised its discretion when it barred the submission of evidence at trial concerning the \$18,000.00 in penalties and interest on the ground that such damages were not related to the negligence, if any, of Seidl. The trial court erred again when it denied the Merriams' post-verdict motions seeking either a new trial

on the issue of damages or *additur*. See § 805.15(6), STATS.² Accordingly, we reverse the trial court's judgment and remand the case to the circuit court. Upon remittitur of record, the circuit court shall conduct a new trial, limited to the issue of damages only, and any issue of the Merriams' alleged failure to mitigate, unless Seidl accepts \$18,000.00 in *additur* (in which case a new trial will be unnecessary).

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Section 805.15(6), STATS., states in pertinent part:

EXCESSIVE OR INADEQUATE VERDICTS. If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount.

